No. 88-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CIRCUIT COURT OF THE 19TH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS,

Petitioner,

vs.

JEFFREY LOVINGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars prosecution after a trial court's *sua sponte* mistrial order, held on review to be unsupported by manifest necessity, where had the defendant timely objected to the order it could have been rescinded?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit in *Lovinger v. Circuit Court of the 19th Judicial Circuit, Lake County, Illinois*, No. 87-1397 (7th Cir. 5/2/88), is not yet reported; a copy of the slip opinion is appended to this petition at A-1.

The Order of the district court, and Report and Recommendation of the magistrate, are reported at *Lovinger v.*

Circuit Court, 652 F.Supp. 1336 (N.D. Ill. 1987), and appended to this petition at A-15 and A-18 respectively.

The decision of the Appellate Court of Illinois, Second Judicial District, is reported at *People v. Lovinger*, 130 Ill. App. 3d 105, 473 N.E.2d 980 (2nd Dist.), *cert. denied*, 474 U.S. 919 (1985), and appended to this petition at A-43.

JURISDICTION

Respondent filed a petition for writ of habeas corpus under 28 U.S.C. §2254. After relief was granted by the district court, petitioner sought review of that decision by the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §§1291 and 2253. On May 2, 1988, a panel of the seventh circuit issued and entered an opinion affirming the Order of the district court. Within ninety (90) days, petitioner lodged the instant petition invoking the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment, United States Constitution:

> No person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . .

STATEMENT OF THE CASE

Respondent was charged by the State of Illinois with unlawful delivery of narcotics to an undercover police agent and proceeded to a bench trial before the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois. When the testimony of the undercover officer and the crime laboratory analyst concluded, the State presented that of evidence officer Thomas Hutchings to establish a chain of custody for the alleged cocaine and cannabis sold. (R. 402) An inconsistency developed as to when Hutchings had taken custody of one of the People's exhibits, and the trial judge granted a short recess so that the prosecutor could "get [his] act together." (R. 448-50)

After the recess, defense counsel alleged that respondent had been irreparably prejudiced by an apparent attempt during the recess to coach Hutchings concerning the chain of custody of various exhibits. (R. 451-53) The prosecutor responded that while he had asked Hutchings to review his records and testify from memory, the two did not discuss the substance of the testimony. (R. 453) The judge stated that the prosecutor had acted improperly and ordered that there be no further conversations between the prosecutor and Hutchings, but determined that no fatal error had occurred; if there was a motion for mistrial, it was denied. (R. 454-56) Defense counsel then unsuccessfully moved that Hutchings' testimony be stricken in its entirety, that he be precluded from testifying further, and that a mistrial be declared. (R. 456-57) Prior to the weekend recess, the judge again admonished Hutchings that he not discuss the case "because you are under oath and because we don't want any mistrial to occur." (R. 486) Near the conclusion of Hutchings' direct testi-

mony, the judge observed that it continued to be confusing. (R. 502)

Officer Michael Bowden was also called as a State's witness to establish chain of custody. During his testimony, he was unable to remember with certainty the specific day he turned over one of the People's exhibits to Hutchings, and the case was continued until afternoon in order that he could check relevant records. (R. 619-20) When proceedings resumed, defense counsel stated that "Once again I am informed that [the prosecutor] has been talking to a witness," Officer Bowden. (R. 622) After hearing from the prosecutor, Officer Bowden, and respondent, the judge called a short recess, observing "I'm not going to have any case with any hint of error, and we are starting to have a lot of error creep into this record." (R. 629)

When he returned to the bench, the judge made the following statement:

> Is everybody in court? Let the record show that the Defendant is present in open court and in his own proper person, with Robert P. Will, his attorney. That the People are represented by Steven McCullom.
>
> Gentlemen, at this time I want to put something on the record. I have not been satisfied with the way this case has been presented. First, I call to the attention of everybody in this courtroom that because of the laxity of the prior State's Attorney and his administration, there was nothing done to resolve this cause of action before a jury or bench trial because of the fact that this matter had occurred in 1979.
>
> Secondly, I am concerned about the lack of discovery afforded the defense, pursuant to court order of Judge Doran, and even of this court.

Third, there was failure to fully comply with the orders of the Court during trial regarding discovery. For example, I point out to my order of September 7th and the fact that a witness in this cause did remove portions from Group Exhibit No. 2, for identification, when I had ordered all of the exhibits to be taken to the defense chemist for purpose of analysis, pursuant to the order of discovery.

Fourth, I am very much concerned about what occurred early this afternoon in this courtroom. And this can be classified as either direct or indirect contempt, and I'm not going into that phase of it. Because of the talking about a pending matter with a witness who says he did not talk with the Assistant State's Attorney, and the Assistant State's Attorney saying to me that he did not talk with the witness, except for request by Bob Will, representing the Defendant and then you changing your conversation after Lovinger under oath indicated certain things. And then you said something else contrary, and it's all on the record.

At this point, in the trial, it is questionable, and I doubt whether discovery has been completed by the State to the defense.

And further it has been disclosed by the witness on the stand, when he said, "I told him I was not pleased with the fact I was getting my butt chewed out, but that was it."

I, as the Court, am wholly unaware of any—I'm sorry. I am only aware of a reprimand by anyone except my admonition to the witness, to the defense and to the Assistant State's Attorney, not to discuss this case with anyone. And prior to I continuing this matter this morning, I said, "I am going to continue this case to 1:30. You don't talk with them; they don't talk with you about this case. Again I'm going to advise, let's get everything in order."

> I feel error has crept into this trial and it can only be resolved by me declaring a mistrial, which I so order, and I recuse myself from this case, and I order you to appoint another judge. Call the Clerk. And the only other judge that will not take this is Strouse, because he had recused himself before. And after it is assigned to another judge, I instruct you to go to the other judge and let him set it for trial. Bond is continued.

(R. 630-32) No further proceedings before the judge were recorded.

Over one month later, after the case was assigned to a new judge, respondent unsuccessfully moved to dismiss the prosecution on double jeopardy grounds. (R. 636, 670) At that time, defense counsel stated that the first judge had uttered the "last sentence or so" of his statement as he was getting up and walking out the door. (R. 644) On respondent's interlocutory appeal to the Appellate Court of Illinois, Second Judicial District, the court observed that respondent had previously moved for a mistrial based upon the prosecutor's mid-testimony conversation with one of his witnesses concerning chain of custody, that the mistrial was declared in part because defense counsel once again brought to the court's attention another discussion between the prosecutor and a witness concerning chain of custody, and that any error in the mistrial order could have been rectified that day or the next. It held that under these circumstances, "it was incumbent upon defense counsel to object to the court's mistrial declaration if, in fact, the defendant wanted to go to judgment." Accordingly, the court declined to rule on respondent's contention that termination of his trial was not supported by manifest necessity. *People v. Lovinger*, 130 Ill. App. 3d 105, 116, 473 N.E.2d 980, 988 (2nd Dist. 1985).

After this Court denied respondent's petition for writ of *certiorari* [*Lovinger v. Illinois*, 474 U.S. 919 (1985)], he filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. §2254, again alleging that abortion of his trial was not justified by manifest necessity. Rejecting petitioner's position that the issue of manifest necessity should not be reached due to respondent's failure to sooner object to the mistrial order, the district court concluded that no necessity existed and that further prosecution of respondent was barred by the Double Jeopardy Clause. *Lovinger v. Circuit Court*, 652 F.Supp. 1336 (N.D. Ill. 1987). Agreeing with the lower court's analysis, the seventh circuit affirmed. (A-14)

REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT'S DECISION MISCONSTRUES DOUBLE JEOPARDY PRECEDENT OF THIS COURT, CONFLICTS IN PRINCIPLE WITH PROCEDURAL DEFAULT PRECEDENT OF THIS COURT, CANNOT BE RECONCILED WITH CASELAW IN THE ELEVENTH CIRCUIT, AND WILL UNNECESSARILY RESULT IN THE OUTRIGHT RELEASE OF GUILTY DEFENDANTS.

Relying on its own decision in *United States ex rel. Clauser v. McCevers*, 731 F.2d 423 (7th Cir. 1984), which in turn relied on this Court's decision in *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980), the court below held that absent manifest necessity for aborting the proceedings, a defendant's consent to a mistrial must be affirmative and clearly evident from the record; even when the defense has failed to interpose a contemporaneous ob-

jection to the mistrial, consent cannot be found where the reviewing court determines "things were going defendant's way" at the moment the mistrial was declared. (A-9, 10)[1] However, nowhere in *DiFrancesco* does this Court address a defendant's duty to object to a mistrial declaration which he deems to be antagonistic to his interests. Similarly, while *United States v. Dinitz*, 424 U.S. 600 (1976), found critical to the issue of consent whether a defendant has retained "primary control over the course to be followed in the event of such error" (*id.* at 609), nothing in that case suggests that control over the proceedings is lost merely because the court *sua sponte* orders a mistrial, which order could be easily rescinded upon request by the defense. *See also United States v. Jorn*, 400 U.S. 470, 484-85 (1971) (requiring a showing of manifest necessity only where the trial court's actions have actually *deprived* or *foreclosed* a defendant of his option to complete his trial before a particular tribunal).

This Court has therefore not squarely decided when a defendant's failure to contemporaneously object to the declaration of a mistrial waives any error or constitutes implied consent to the action. *Dinitz* held, however, that the right not to be placed twice in jeopardy after declaration of a mistrial is not among those rights which must be waived knowingly and voluntarily under *Johnson v. Zerbst*, 304 U.S. 458 (1938). 424 U.S. at 609, n. 11. And this Court has further made clear that where non-funda-

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[1] This position is in conflict with that of the eleventh circuit in *United States v. Puleo*, 817 F.2d 702, 705 (11th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 491 (1987), which held that complaint of an improperly declared mistrial must be made as soon as possible if it is to be preserved for appellate review. Although the *Puleo* decision was brought to the court's attention below, it was not noted in the seventh circuit's opinion.

mental rights are at issue, the adversary system places an affirmative duty on defense counsel to invoke the right. In *Estelle v. Williams*, 425 U.S. 501 (1976), for example, this Court refused to find fault with the trial court in failing to affirmatively ascertain whether the defendant consented to appearing before the jury while dressed in jail garb:

> To impose this requirement suggests that the trial judge operates under the same burden here as he would in the situation in *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), where the issue concerned whether the accused willingly stood trial without the benefit of counsel. Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.

Id. at 513. *See also id.* at 508, n. 3 (a counseled defendant must affirmatively invoke non-fundamental rights, affording the trial judge an opportunity to remedy any error, or suffer waiver of his claim); *Greer v. Miller*, ____ U.S. ____, 107 S.Ct. 3102, 3109, n. 8 (1987) (defense counsel bears primary responsibility for ensuring that error is cured in the manner most advantageous to his client); *Jones v. Barnes*, 463 U.S. 745 (1983) (suggesting counseled defendant not bound by attorney's failure to invoke his rights only where fundamental decisions of whether client should plead guilty, waive a jury, testify in his own behalf or take an appeal have been made without client's concurrence).

Independent of trial error, a wide range of strategic advantages exists which a defendant could secure by foregoing his right to proceed to verdict. And defense coun-

sel, not an appellate court engaged in *post facto* review, is in the best position to determine whether "things were going defendant's way", particularly where the assessment incorporates factors wholly unrelated to proceedings memorialized on the record. Because the danger that a defendant will later complain of rulings in which he has acquiesced is manifest, and because unrectified error forever prohibits society from vindicating its interests in prosecuting the guilty, the need for a contemporaneous objection requirement in the context of mistrial declarations is extraordinary.

Citing to this Court's decision in *United States v. Jorn*, 400 U.S. 470 (1971), the lower court noted that in any event defense counsel here did not have a reasonable opportunity to object to the mistrial order because it appeared the trial judge actually left the courtroom as he finished his statement. In *Jorn*, the trial judge precipitously discharged a jury and an attempt to subsequently reconstitute that jury would give rise to core sixth amendment concerns. *Compare Green v. United States*, 355 U.S. 184, 191 (1957) (defendant's jeopardy terminated when the jury discharged), *with United States v. Smith*, 621 F.2d 350, 352, n. 2 (9th Cir. 1980), *cert. denied*, 449 U.S. 1087 (1981) (mistrial order may be reconsidered prior to actual discharge of jury). In the context of the bench trial conducted here, on the other hand, it may be presumed that the judge's capability as fact-finder would remain intact so as to leave unaffected respondent's right to proceed to verdict with his original trier of fact despite the temporary entry of a mistrial order.[2]

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[2] That the trial court also ordered the case reassigned is irrelevant; even in the federal courts a judge retains jurisdiction to act on an order recusing himself when the case has not yet been reassigned to a specific judge. *See, e.g., Haas v. Pittsburgh Nat'l Bank*, 627 F.2d 677 (3rd Cir. 1980).

The seventh circuit further noted that respondent had no opportunity at all to object until he appeared before the newly-assigned judge over one month later when the mistrial was a *fait accompli*. In making this observation, the court inexplicably relied on a conclusory representation made by respondent's counsel at oral argument while ignoring Illinois caselaw including the very decision rendered by the state court here. Illinois trial judges hold the general power to modify or vacate their orders any time before final judgment. Specifically, as a matter of Illinois law defense counsel could have sought reconsideration of the mistrial order that day or the next. *See People v. Lovinger*, 130 Ill. App. 3d 105, 116, 473 N.E.2d 980, 988 (2d Dist.), *cert. denied*, 474 U.S. 919 (1985). *Cf. People v. Camden*, 115 Ill.2d 369, 504 N.E.2d 96, *cert. denied*, ____ U.S. ____, 107 S.Ct. 2464 (1987) (where jury has not yet been discharged, mistrial order may be properly rescinded); *People v. Escobar*, ____ Ill. App. 3d ____, 522 N.E.2d 191 (1st Dist. 1988) (same); *People v. Estrada*, 91 Ill. App. 3d 228, 414 N.E.2d 512 (3rd Dist. 1980) (same); *People v. Bean*, 26 Ill. App. 3d 1059, 325 N.E.2d 679 (4th Dist. 1975) (same).[3]

To require that a defendant at least once make his position known to the court while potential error can still be corrected imposes on the litigant no serious, much less unconstitutional, burden. *Cf. Thomas v. Arn*, ____ U.S. ____, 106 S.Ct. 466, 475 (1985) (the right of appeal was

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[3] Equally confusing in light of the state appellate court's express refusal to consider the issue of manifest necessity due to respondent's failure to timely object (130 Ill. App. 3d at 116, 473 N.E.2d at 988) is the seventh circuit's finding that comity considerations underlying this Court's decision in *Wainwright v. Sykes*, 433 U.S. 72 (1977), are inapplicable here because the state court considered and rejected respondent's claim on its merits. (A-6, n. 2).

not denied by holding claims forfeited by failure to object to magistrate's report; "it was merely conditioned on the filing of a piece of paper"). At the same time, the failure to impose a contemporaneous objection requirement would encourage abuse of the judicial system and more likely result in the outright release of guilty persons because the defense has strong incentive to be "victimized" by an unnecessary mistrial declaration. The lower court's resolution of this significant issue, upon which the federal courts are in conflict, is deserving of review by this Court.

CONCLUSION

For all the reasons discussed herein, a writ of *certiorari* should issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-1397

JEFFREY LOVINGER,

Petitioner-Appellee,

v.

CIRCUIT COURT OF THE 19TH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 10169—**Charles R. Norgle,** *Judge.*

ARGUED DECEMBER 11, 1987—DECIDED MAY 2, 1988

Before FLAUM and EASTERBROOK, *Circuit Judges,* and GRANT, *Senior District Judge.**

FLAUM, *Circuit Judge.* Jeffrey Lovinger's bench trial on charges of unlawful delivery of cocaine and cannabis ended in a mistrial on February 8, 1983. Lovinger was unable to convince the Illinois courts that the double jeopardy clause of the fifth amendment bars his reprosecution for these offenses. After exhausting his state court

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* The Honorable Robert A. Grant, Senior District Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

remedies, Lovinger petitioned the district court for a writ of habeas corpus. The district court granted the writ and we affirm.

I.

Lovinger's trial in the Circuit Court for the Nineteenth Judicial Circuit, Lake County, Illinois was hampered from the start by the prosecutor's inability to establish a clear chain of custody over the evidence. The details of the trial are fully set forth in Magistrate Bucklo's thorough Report and Recommendation, which is appended to the district court's opinion. *Lovinger v. Circuit Court*, 652 F. Supp. 1336, 1338 (N.D. Ill. 1987). The state's first witness was the undercover officer who had purchased packages of white powder and a green leafy substance from Lovinger in October of 1979. The evidence was divided into several exhibits. When it emerged during cross-examination that defendant's expert had not been permitted to test all of the exhibits as required by the court's discovery order, the judge continued the trial to allow for such testing. When trial resumed, the state called an analyst from the Illinois police crime laboratory who testified that the substances purchased by the undercover officer were in fact cocaine and cannabis.

It was during the testimony of the next witness, an evidence officer for the Waukegan Police Department, that the state's chain of custody problems began. Officer Thomas Hutchings testified that he gave Exhibit No. 1 to an outside examiner on November 4, 1982 for testing. The prosecutor questioned Hutchings about the inconsistency between this testimony and Hutchings' earlier testimony that he had not come into contact with this exhibit between September 14 and November 18, 1982. The trial judge told the prosecutor that he was impeaching his own witness and granted a recess so that the prosecution could "get its act together."

When the trial resumed, Lovinger's lawyer reported that Hutchings and the prosecutor had been seen discuss-

ing the case during the recess and examining and exchanging papers. The prosecutor denied coaching the witness. The judge ordered that there be no further conversations, and told the defense that any error was harmless so that if Lovinger intended to move for a mistrial, the motion would be denied. Lovinger's lawyer then moved that the court declare a mistrial or alternatively that Hutchings' testimony be stricken and that he be precluded from testifying further. The court denied these motions. Hutchings resumed testifying, and again contradicted himself as to when he had turned over the exhibits for outside examination and when the examiner had returned them to the evidence room. Another short recess was declared, after which Hutchings' recollection was considerably clearer. Before recessing until the following Monday, the court instructed Hutchings not to discuss the case or his testimony with anyone.

Unfortunately for the state, Hutchings' recollection was less than lucid when he resumed the stand on Monday, February 7, 1983. He could not remember, even when aided by suggestive questioning, when he had given out or returned certain of the exhibits. The judge felt compelled to state:

> This record has got evidence going out and never returning. This record has got the evidence, the same evidence going out twice, never returning for the first time. There is confusion.

During cross-examination, Hutchings discussed police procedures for entering into a log book the dates for the removal or return of evidence. Defense counsel requested review of the log book; the court granted a half-hour recess for this purpose. After the recess, Hutchings testified that one of the log book entries, which conflicted with his testimony, was incorrect.

On February 8, Officer Bowden, the government's next chain of custody witness, also had trouble recalling when he had returned one of the exhibits to the evidence locker. The judge continued the case until the afternoon and in-

structed Bowden not to discuss his testimony. When the trial resumed, defense counsel told the Judge that Lovinger had seen the prosecutor talking with Bowden during the recess and had heard something about the evidence locker. The prosecutor admitted having asked for certain reports, but denied discussing any aspect of Bowden's testimony. When asked if he had discussed his testimony with the prosecutor, Bowden revealed that he had only been expressing his displeasure "with the fact that I was getting my butt chewed out." The judge asked for the reports and stated, "I'm not going to have any case with any tint of error, and we are starting to have a lot of error creep into this record."

The judge took a short recess, and upon return verified that all parties and counsel were present. He then proceeded with the following declaration:

> Gentlemen, at this time I want to put something on the record. I have not been satisfied with the way this case has been presented. First, I call to the attention of everybody in this courtroom that because of the laxity of the prior State's Attorney and his administration, there was nothing done to resolve this cause of action before a jury or bench trial because of the fact that this matter had occurred in 1979.
>
> Secondly, I am concerned about the lack of discovery afforded the defense, pursuant to court order of Judge Doran, and even of this court.
>
> Third, there was a failure to fully comply with the orders of the Court during trial regarding discovery. For example, I point out to my order of September 7th and the fact that a witness in this cause did remove portions from Group Exhibit No. 2, for identification, when I had ordered all of the exhibits to be taken to the defense chemist for purpose of analysis, pursuant to the order of discovery.
>
> Fourth, I am very much concerned about what occurred early this afternoon in this courtroom. And this can be classified as either direct or indirect con-

tempt, and I'm not going into that phase of it. Because of the talking about a pending matter with a witness who says he did not talk with the Assistant State's Attorney, and the Assistant State's Attorney saying to me that he did not talk with the witness, except for request by Bob Will, representing the defendant, and then you changing your conversation after Lovinger under oath indicated certain things. And then you said something else contrary, and it's all on the record.

At this point in the trial, it is questionable, and I doubt whether discovery has been completed by the state to the defense.

And further it has been disclosed by the witness on the stand, when he said, "I told him I was not pleased with the fact I was getting my butt chewed out, but that was it."

I, as the Court, am wholly unaware of any—I'm sorry. I am only aware of a reprimand by anyone except my admonition to the witness, to the defense and to the Assistant State's Attorney, not to discuss this case with anyone. And prior to I continuing this matter this morning, I said, "I am going to continue this case to 1:30. You don't talk with them; they don't talk with you about this case. Again I'm going to advise, let's get everything in order."

I feel error has crept into this trial and it can only be resolved by me declaring a mistrial, which I so order, and I recuse myself from this case, and I order you to appoint another judge. Call the Clerk. And the only other judge that will not take this is Strouse, because he had recused himself before. And after it is assigned to another judge, I instruct you to go to the other judge and let him set it for trial. Bond is continued.

The judge left the courtroom as he was finishing his statement.

The clerk of the court reassigned the case to Judge McQueen. On February 18, 1983, at Lovinger's first appearance before the new judge, he objected that the mistrial was not required by manifest necessity and moved to dismiss on double jeopardy grounds. The case was continued until March 18, when Judge McQueen heard arguments and denied the motion. The Appellate Court of Illinois, Second District, affirmed the circuit court's order[1] and remanded the case for trial. The appellate court reasoned that Lovinger had consented to a mistrial by moving for one early in the trial and by failing to object when the judge made his announcement. *People v. Lovinger*, 130 Ill. App. 3d 105, 473 N.E.2d 980, 85 Ill. Dec. 381 (1985).[2]

The Illinois Supreme Court denied leave to appeal, the United States Supreme Court denied Lovinger's petition for certiorari, 474 U.S. 919 (1985), and on December 6, 1985 Lovinger filed a habeas petition in the district court. Both parties moved for summary judgment. The matter was referred to Magistrate Bucklo, who issued a report on December 17, 1986 finding after careful analysis that Lovinger did not consent to a mistrial and that no manifest necessity for a mistrial existed. The district court adopted the magistrate's report and granted the writ of

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[1] Under Illinois Revised Statutes, chapter 110, paragraph 604(f), a defendant "may appeal to the Appellate Court the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy."

[2] Nothing in the Illinois Appellate Court's ruling that Lovinger consented to mistrial indicates a deliberate, strategic bypass of a state procedural opportunity. *See Brownstein v. Director, Illinois Dept. of Corrections*, 760 F.2d 836 (7th Cir. 1985). Further, Lovinger's failure to object during the mistrial declaration did not deprive the Illinois courts of the opportunity to consider the propriety of mistrial and therefore to cure any error themselves. *See Wainright v. Sykes*, 433 U.S. 72 (1977). Both Judge McQueen and the Illinois Appellate Court considered Lovinger's claim and rejected it on its merits. We agree with the district court that even if this case implicated the concerns raised in *Sykes*, Lovinger has shown the cause and prejudice necessary to obtain habeas review.

habeas corpus on February 12, 1987 barring reprosecution on the cocaine and cannabis charges.[3] The district court's judgment was stayed pending this appeal.

II.

The double jeopardy clause of the fifth amendment,[4] applicable to the states through the fourteenth amendment, *Benton v. Maryland*, 395 U.S. 784, 787 (1969), protects at least two important interests. *United States v. Rich*, 589 F.2d 1025, 1028 (10th Cir. 1978). First, individuals should be spared the emotional and financial hardship of successive prosecutions at the powerful hand of the State. *Green v. United States*, 355 U.S. 184, 187-88 (1957). Second, defendants must be protected from the unfairness of a mistrial declaration designed to give the government a second chance to convict when the first is going badly. *Gori v. United States*, 367 U.S. 364, 369 (1961). These concerns, implicated by both bench and jury trials, *United States v. Jorn*, 400 U.S. 470, 479 (1977) (plurality opinion), must be balanced against "the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). Thus, the double jeopardy clause does not bar all reprosecution. A defendant who consents to the termination of a first trial may again be put in jeopardy for the same offense, unless the conduct of the prosecutor or judge was intended to provoke the mistrial. *Oregon v. Kennedy*, 456 U.S. 667 (1982). Even when a defendant does not consent, he may be retried if there was "manifest necessity" that the first trial be terminated. *See United States v. Dinitz*, 424 U.S. 600, 606-7 (1976); *Clauser v. McCevers*, 731 F.2d 423, 426 (7th Cir. 1984).

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[3] Apparently because of some confusion as to when the writ was granted, the district court issued an order on June 30, 1987 granting the writ *nunc pro tunc* on February 13, 1987.

[4] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. Const. amend. V.

A.

The state alleges that Lovinger explicitly consented to the mistrial by making a motion earlier in the proceedings. The state further argues that Lovinger implicitly consented to the mistrial by failing to object during the trial judge's declaration. We reject both arguments.

The defense moved for a mistrial during officer Hutchings' testimony. We hold that this motion did not constitute explicit consent to a mistrial. First, the motion was merely perfunctory. Defense counsel moved for a mistrial only after the judge told him that any mistrial motion he made would be denied; his resulting motion was denied as promised. Second, the judge's eventual mistrial declaration was not based on allegedly improper conversations between officer *Hutchings* and the prosecutor—the only grounds for Lovinger's only mistrial motion. When the judge declared a mistrial later in the proceedings, he identified four reasons for his dissatisfaction with the trial: 1) the state's delay in bringing the case to trial; 2) the lack of discovery allowed the defense; 3) the state's failure to comply with the court's discovery orders; and 4) the prosecutor's conversations with witness Bowden. The judge did not mention Lovinger's earlier objection and mistrial motion which were made during Hutchings' testimony. In any case, in light of the state's repeated foibles and the trial judge's resulting displeasure with the prosecution of the case, Lovinger's assessment of his chances of acquittal may well have changed in the interim between the perfunctory mistrial motion and the eventual mistrial declaration. *See Russo v. Superior Court*, 483 F.2d 7, 17 (3d Cir.), *cert. denied*, 414 U.S. 1023 (1973) (no consent where defendant made a mistrial motion on grounds of jury deadlock one day prior to court's mistrial declaration on grounds of jury exhaustion). "We see no reason to lock [defendant] into a motion once it is made." *Id.*

We also refuse to construe as a mistrial motion the fact that Lovinger brought to the court's attention the allegedly improper conversation between Bowden and the prose-

cutor. The defense might on one hand be damaged by a witness who testifies more convincingly as a result of improper conversations with the prosecutor. However, by pointing out the impropriety to the court at a bench trial, the defense may effectively impeach that witness' credibility. The defendant might well be pleased with this result and, far from desiring a mistrial, might wish to proceed to a verdict before the first tribunal. We cannot presume that the defense deems itself hurt rather than helped by such an occurrence, and on that basis convert an objection into a mistrial motion. Further, were we to construe consent to mistrial so broadly, the state would routinely gain a second chance to prosecute without meeting the well-established "manifest necessity" standard.[5] Nearly every objection or complaint by a defendant regarding the fairness of the proceedings could be construed, under such a far-reaching interpretation, as a motion for mistrial and therefore a waiver of the protection of the double jeopardy clause. We will not search for consent where it is not affirmatively given and clearly evident on the record. *See Clauser*, 731 F.2d at 426.

B.

Lovinger's failure to object to the mistrial declaration also cannot be considered implied consent because he had no opportunity to object. It appears from the record that the judge actually left the courtroom as he finished his statement. He was gone before the defense had any reasonable opportunity to consider the import of his statement and act upon it. *See Jorn*, 400 U.S. at 487 (trial judge acted so abruptly there was no opportunity to object); *Russo*, 483 F.2d at 17. *Cf. United States v. Buljabasic*, 808 F.2d 1260, 1266 (7th Cir. 1987) (defendant had "ample time to deliberate"); *United States v. Smith*, 621 F.2d 350, 352 (9th Cir. 1980), *cert. denied*, 449 U.S. 1087 (1981) ("Defense counsel did not object to the order of mistrial, de-

[5] *See* part III *infra*.

spite adequate opportunity to do so."); *United States v. Goldstein*, 479 F.2d 1061, 1066-67 (2d Cir.), *cert. denied*, 414 U.S. 873 (1973) (same). Defense counsel could not reasonably have been expected to interrupt the judge in the few moments between the surprise mistrial declaration and the judge's departure from the courtroom. The record reflects, and counsel represented at oral argument, that Lovinger objected to mistrial at his earliest opportunity—February 18, 1983—when he was first brought before Judge McQueen for retrial.

In any event, by the time of the mistrial declaration, "things were going defendant's way, making an inference of assent from silence implausible." *Buljabasic*, 808 F.2d at 1266. The prosecutor had been unable to establish a simple chain of custody, had failed to comply with discovery orders, and had allegedly talked to witnesses during recesses in their testimony. This is not a case where the trial judge was forced to declare a mistrial *sua sponte* "in the sole interest of the defendant." *Gori*, 367 U.S. at 369. As noted, in light of the prosecution's performance Lovinger would not likely have chosen to assent to the mistrial declaration had he been given time to deliberate. Not once during the course the prosecution's lackluster presentation did Lovinger's counsel make an unsolicited mistrial motion. And after taking time to consider the desirability of a mistrial, Lovinger objected at his first available opportunity. The trial judge should have permitted the defense at least to express its view before making the unexpected mistrial declaration. "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [judicial or prosecutorial] error." *United States v. Dinitz*, 424 U.S. 600, 609 (1976). By failing to allow Lovinger to express his view on the propriety of mistrial, the judge deprived Lovinger of the opportunity to exercise any control over the fate of the trial. *Cf. United States v. Phillips*, 431 F.2d 949 (3rd Cir. 1970) (where defense did not object to dismissal of jury, state of record was insufficient to hold that trial judge erred).

III.

Because the trial judge thus aborted the proceedings without Lovinger's consent, the double jeopardy clause prohibits the state from retrying Lovinger unless there was "manifest necessity" for the mistrial. *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980); *United States v. Perez*, 9 Wheat 579 (1824). Under this standard, the trial judge may declare a mistrial only if a "scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *United States v. Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion) (quoting *Perez*, 9 Wheat at 580). Whether this nebulous standard is met can only be determined on a case by case basis. *Illinois v. Somerville*, 410 U.S. 458, 463 (1973). The discretion of the trial judge to determine the existence of manifest necessity for mistrial is of course entitled to deference. *Id.* at 462. The failure to exercise discretion, however, may be tantamount to abuse. The record must reflect that the trial court kept "in the forefront the defendant's valued right 'of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.' " *United States v. Starling*, 571 F.2d 934, 938 (5th Cir. 1978) (quoting *Jorn*, 400 U.S. at 486).

Although the "manifest necessity" test has not been applied in a mechanical fashion, courts have considered whether the trial judge consulted counsel before declaring a mistrial, *e.g.*, *Arizona v. Washington*, 434 U.S. 497, 514 n.34, 515-16 (1978); *Grandberry v. Banner*, 653 F.2d 1010, 1015 (5th Cir. 1981), and whether the record indicates that the judge considered significant available alternatives, *e.g.*, *Somerville*, 410 U.S. at 469-70; *Jorn*, 400 U.S. at 487. "A precipitate decision, reflected by a rapid sequence of events culminating in a declaration of mistrial, would tend to indicate insufficient concern for the defendant's constitutional protection." *Brady v. Samaha*, 667 F.2d 224, 229 (lst Cir. 1981). *See Grandberry*, 653 F.2d at 1015-16; *Cherry v. Director, State Board of Corrections*, 635 F.2d 414, 417-18 (5th Cir. 1981). "Thus, if a trial judge

acts irrationally or irresponsibly, . . . his action cannot be condoned." *Arizona v. Washington*, 434 U.S. at 514 (citations omitted).

The record indicates that the trial judge took the kind of abrupt and precipitate action which is inconsistent with the exercise of sound discretion under the "manifest necessity" test. Other than one perfunctory motion four days prior to the mistrial declaration, the possibility of mistrial was never raised during the course of the proceedings. The judge showed some frustration with the prosecution, but nothing in his remarks indicate any contemplation of the necessity of declaring a mistrial or cognizance of the double jeopardy consequences of such a course. During Bowden's testimony, the judge took a short recess and then proceeded into a lengthy and unexpected summary of his displeasure with the course of the trial. Neither defense nor prosecution were consulted, and neither could have reasonably expected a *sua sponte* mistrial declaration. There is no evidence on the record that the court gave careful thought to alternatives. Further, it is doubtful that mistrial was an appropriate response to the perceived error. *See Lovinger*, 652 F. Supp. at 1347-48 (Report and Recommendation of Magistrate Bucklo). Of the first two concerns mentioned by the judge, the delay in prosecution would only be worsened by retrial, and the discovery violations were remedied early enough in the trial so as not to prejudice Lovinger. Any prejudice resulting from the prosecution's conversations with witnesses could have been addressed by striking testimony and/or barring future testimony by any tainted witnesses. And in any event, it was premature to declare a mistrial before making some attempt to resolve discrepancies in the various accounts of the prosecutor's conversation with Bowden. *See id.* Whether or not options short of mistrial were feasible and preferable (and it appears that they were), the court did not consider them and thus did not afford proper solicitude for Lovinger's valued right to continue with the trial.

IV.

Lovinger did not consent to a mistrial, and there was no manifest necessity for the mistrial declaration. The decision of the district court granting Lovinger's petition for a writ of *habeas corpus* is therefore AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 2, 1988.

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

JEFFREY LOVINGER,

Petitioner-Appellee,

No. 87-1397 vs.

ATTORNEY GENERAL, STATE OF ILLINOIS,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 10169—Charles R. Norgle, Judge.

The cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

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* Hon. Robert A. Grant, Senior District Judge of the Northern District of Indiana, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,
ex rel. LOVINGER,

Plaintiff,

vs.

CIRCUIT COURT FOR THE 19TH JUDICIAL
CIRCUIT, LAKE COUNTY, ILLINOIS,

Defendant.

No. 85 C 10169
Judge Charles R. Norgle

ORDER

This matter is before the Court for ruling on Respondent, Illinois Circuit Court for the 19th Judicial Circuit, Lake County, Illinois', objections to Magistrate Bucklo's Report and Recommendation. Pursuant to 28 U.S.C. § 636(b)(a)(B), the Court referred the Petition for Writ of Habeas Corpus to the Executive Committee for assignment to a magistrate for ruling in 60 days. The Executive Committee gave its consent and this case was assigned to Magistrate Bucklo on June 17, 1986.

On December 17, 1986 Magistrate Bucklo filed her Report and Recommendation. The report recommended this Court grant the Petition for Writ of Habeas Corpus. On January 5, 1987 Respondent filed objections to Magistrate Bucklo's Report and Recommendation.

The record shows *inter alia* that after days of a difficult trial Judge Hoogasian sua sponte declared a mistrial. He said: "I'm not going to have any case with a tint of error, and we are starting to have a lot of error creep into this record." Following that statement, he heard no further evidence or argument, took a recess, returned, and sua sponte declared a mistrial, the basis for which he stated in the record.

It is a rare case indeed in which a trial judge in a bench trial cannot control by proper use of his discretion the attorneys and the witnesses who appear before the court. The record here does not show any intentional, contumacious or substantial misconduct on the part of the attorneys or the witnesses. The slow pace of the trial and its many problems would challenge the best of judges, but none of whom would be without sufficient authority, including the imposition of sanctions if called for, to see to it that the trial moved fairly and expeditiously to a just conclusion. The problems here perceived by the trial judge could have been corrected short of aborting the trial sua sponte. For fleeting moments during the course of protracted trials, a jurist may ruefully wish for the opportunity to start anew. Such is not the law nor ought it be. Even the pursuit of the elusive and unattainable perfect trial is not enough. This trial should have been decided on its merits.

In its Objection to the Report and Recommendation of the Magistrate, Respondent asks, alternatively, for "an evidentiary hearing wherein the Petitioner's deliberate bypass may be litigated." This court finds that a hearing on issues raised by the Respondent and characterized as procedural defaults, strategic by-pass of the right to proceed, calculated decision to acquiesce, deliberate by-pass, and inexcusable neglect is neither required nor appropriate in light of the clear record in this matter.

Petitioner complied with all state procedural requirements in asserting his double jeopardy claim in the state court. The Magistrate discussed fully the issue of whether Petitioner had consented to the mistrial declared by the state trial judge as a question of federal constitutional law. *United States ex rel. Clauser v. McCevers*, 731 F.2d 423 (7th Cir. 1984). Further, this court finds the requirements *Wainwright v. Sykes*, 443 U.S. 71 (1977), that Petitioner show cause and prejudice before a federal court can adjudicate his claim of a constitutional deprivation on the merits, have been satisfied in this case.

After a *de novo* review, the Court finds Magistrate Bucklo's Report and Recommendation is supported by the record and the cited authorities. Accordingly, the Court adopts and incorporates Magistrate Bucklo's Report and Recommendation pursuant to 28 U.S.C. § 636(B)(1)(V) as Appendix A of this Order and orders as follows:

The Petition of Jeffrey Lovinger for Writ of Habeas Corpus is granted.

IT IS SO ORDERED.

ENTER:

/s/ Charles Ronald Norgle
Judge
U.S. District Court

DATED: 2-2-87

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the matter of UNITED STATES OF AMERICA ex rel. LOVINGER,

Plaintiff,

vs.

ATTORNEY GENERAL, STATE OF ILLINOIS,

Defendant.

No. 85 C 10169

REPORT AND RECOMMENDATION
of Magistrate Elaine E. Bucklo

Jeffrey Lovinger ("Lovinger"), was tried in a bench trial before the circuit court for the Nineteenth Judicial Circuit, Lake County, Illinois, on three counts of delivery of cocaine and cannabis. That trial ended in a mistrial. When the case was set for retrial, Lovinger moved to dismiss on double jeopardy grounds.[1] The court denied his motion and Lovinger appealed. The Appellate Court affirmed the denial of that motion, *People v. Lovinger*, 130 Ill.App.3d 105, 473 N.E.2d 980 (2nd Dist. 1985), and the

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[1] The fact that Lovinger was tried in a bench trial, rather than a jury trial, does not affect his rights under the double jeopardy clause. *United States v. Jenkins*, 420 U.S. 358, 365 (1975) (overruled on other grounds, *United States v. Scott*, 437 U.S. 82, 87 (1978); *Gwinn v. Deane*, 613 F.2d 1, 2 n. 3 (1st Cir. 1980).

Illinois Supreme Court and United States Supreme Court denied certiorari, ____ U.S. ____, 106 S.Ct. 248. Having exhausted his state court remedies, Lovinger petitioned the federal district court for a writ of habeas corpus. For the reasons stated below, Lovinger's petition should be granted.

Lovinger was arrested on October 16, 1979 after he allegedly sold substances purported to be cocaine and cannabis to an undercover police agent. A bench trial before Judge Hoogasian began on November 3, 1982.

The State's first witness was Paula Lemke, a police officer. She testified that on October 15, 1979 she purchased from Lovinger a quantity of a white powder which he represented to be cocaine (People's Exhibit No. 1), R-14-20, and that on October 16, 1979, she purchased from Lovinger three packages of a white powder (People's Exhibit No. 2) and one package of a green leafy substance (People's Exhibit No. 3) which he represented to be cocaine and cannabis, respectively. R-31-46.

During cross-examination Lemke testified that Lovinger's expert had been given a sample from only one of the three bags in People's Exhibit No. 2. Judge Hoogasian expressed concern that the State had not complied with his discovery order that Lovinger's expert be permitted to test all three packages in People's Exhibit No. 2, and continued the trial until this order was complied with. R-60-4.

When the trial resumed, Lemke testified on cross-examination that on October 5, 1979, she and another person purchased a quantity of powder purported to be cocaine from Jeffrey Lovinger (Defendant's Exhibit No. 1, Exhibit No. 4) R-74-82, and that she bought a further quantity of a powder purported to be cocaine from Lov-

inger on October 10, 1979. (Defendant's Exhibit No. 2, Exhibit No. 5). R-86-9.

David Stroz, an analyst at the Northern Illinois Police Crime Laboratory, testified that he received People's Exhibit No. 1 on October 19, 1979 from police officer Tom Hutchings and People's Exhibits Nos. 2 and 3 on October 17, 1979. He received People's Exhibit No. 2 from police officer Michael Bowden. R-239-41, 250-2, 277-8. He tested the exhibits on October 19 and found that all the white powders contained cocaine and that the green leafy substance contained cannabis. R-249, 260, 281-2. He removed People's Exhibits Nos. 4 and 5 from the evidence locker on October 22, 1979, tested them, and determined that they contained cocaine. R-286, 290, 293-300.

The State's next witness was police officer Thomas Hutchings. He testified that at all relevant times he was an evidence officer for the Waukegan Police Department. He testified that he first saw People's Exhibit No. 1 on October 16, 1969, when he received it from Officer Michael Bowden, and that it remained in a locked evidence room until October 19, 1979 when he delivered it to Stroz at the Northern Illinois Police Crime Lab. R-402-4. It was returned on October 26, 1979, R-405. He testified that he next came into contact with it on November 18, 1982 when it was requested by the prosecutor. R-406-7. He later testified that Officer Lemke removed the entire exhibit on September 8, 1982 and returned it the same day, and that she took a sample from the exhibit on September 14, 1982. R-410-413. The exhibit remained in his custody and control between then and November 18, 1982. R-418.

Hutchings testified that he first came into contact with People's Exhibit No. 2 on October 26, 1979, and that the exhibit remained in the evidence room until September

8, 1982. R-426-8. On that date it was turned over to Officer Lemke, who returned it the same day. R-428-32. Officer Lemke took a sample from the exhibit on September 14, 1982. R-433. Hutchings testified that the exhibit remained in the evidence room until November 4, 1982, when it was turned over to Walter Williams for outside examination. R-438. Hutchings testified that he next saw Exhibit No. 2 on November 9, 1982 when Williams returned it. Hutchings testified that on November 4, he gave Williams four exhibits, including Exhibits Nos. 1 and 2, all of which were returned on November 9. R-441.

The prosecutor then attempted to elicit testimony resolving the inconsistency between this testimony and Hutchings earlier testimony that he had not come into contact with Exhibit 1 between September 14, 1982 and November 18, 1982. R-442-6. The judge stated that the prosecutor was developing two chains of evidence and impeaching his own witness. R-448-9. The judge then granted a recess so that the prosecutor could "get [his] act together."

After the recess, defense counsel stated that Lovinger's sister had told him that the prosecutor and Hutchings had been discussing the case and examining and exchanging papers for about 10 minutes. He stated that he felt any remaining testimony of Hutchings would be tainted and that Hutchings would be testifying not to his own recollections but rather according to the directions of the prosecutor. R-451-3.

The prosecutor stated that he had told Hutchings he could not discuss the case with him, that he had then asked for, received, and looked at Hutchings' records, and that he asked Hutchings to review his records and testify from memory. R-453.

The judge stated that the prosecutor had acted improperly, but that no fatal error had occurred, and that if the defense counsel's statement had been a motion for a mistrial, it would be denied. He ordered that there be no further conversations between the prosecutor and Hutchings. R-456. The defense counsel then moved that Hutchings' testimony be stricken in its entirety, that he be precluded from testifying further, and that a mistrial be declared. R-456-7. Judge Hoogasian denied these motions. *Id.*

Hutchings then testified that he turned over Exhibits Nos. 1 and 2 to the prosecutor on November 3, 1982, and received them back from Walter Williams on November 9, 1982. R-461-5. Later, however, on cross-examination, he testified that he could not remember when he turned over Exhibits 1, 2, and 3 to the prosecutor. R-578. He then testified, after refreshing his recollection, that he had turned over Exhibits Nos. 1 and 2 to the prosecutor on November 18, and that they were returned by the prosecutor on November 19. R-465-6, 467-8.

Hutchings testified that he first came into contact with People's Exhibit No. 3 on October 26, 1979, that he received it from Muriel Samuels and that upon receiving it he placed it in the evidence room. R-475-7. On September 14, 1982, Lemke took a sample from the exhibit in Hutchings presence and resealed it. R-478. The exhibit thereafter remained in the evidence room until he turned it over to the prosecutor on November 3, 1982. R-480. Initially, Hutchings could not recall when he received the exhibit back from the prosecutor; R-480-481; after a short recess Hutchings' recollection was restored and he testified that the prosecutor returned it to him on November 4, 1982, R-482. He turned the exhibit over to the prosecutor again on November 18, 1982, and received it back the following day. R-482.

The court then recessed until 9:30 the following Monday, after having instructed Hutchings

> not to discuss this matter, this case, nor your testimony, nor the evidence with any lawyers, witnesses, strangers, police officers or any individual because you are under oath and because we don't want any mistrial to occur.

R-486.

When court resumed, Hutchings testified that he received People's Exhibit No. 4 on October 5, 1979, that he delivered it to Richard Haviland, an employee of the crime lab, on October 12, 1979, and that he receive it back on October 26, 1979, and that it remained in storage until November 3, 1982 when it was given to the prosecutor. R-495-8. He stated, however, that he could not recall when he received it back. Upon further questioning, he stated that he had no records indicating that it had been given to the prosecutor on November 3, and that his first written record showed that he gave the exhibit to Walter Williams, an employee of the State's Attorney's Office, on November 4, 1982. R-498-501. The following colloquy occurred:

> Q. Did you give it to me on November 3, 1982?
>
> A. With the records I have in front of me, I would have to say no.

R-501.

Judge Hoogasian observed

> The record speaks for itself . . . The record has got evidence going out and never returning. This record has got the evidence, the same evidence going out twice, never returning the first time. There is confusion.

R-502.

On cross-examination, Hutchings testified concerning the layout and procedures for receiving and storing evidence. When the evidence room was closed, officers bringing in evidence would put it in one of a battery of lockers outside the booking room. Each locker had two keys; one was in Hutchings' office, and the second was in the locker. After depositing evidence, the officer would remove the key and deposit it in a special locker. Each morning Hutchings would open that locker, collect the keys, open the lockers and remove the evidence to the evidence room. R-538-41.

During cross-examination, Hutchings testified that a log book was kept which included the date of each time evidence was delivered to or removed from the evidence room. R-538. The defense counsel requested that he be permitted to examine the log book. The prosecutor objected that the request was untimely. He admitted that the log book had not been tendered on discovery, since "it is not a statement of any witness in the case." The judge nevertheless granted a half hour recess for the prosecutor and defense counsel to examine the log book. The counsel were instructed not to question the witness. R-550.

On further cross-examination, Hutchings testified that an entry in the log books in his handwriting indicated that People's Exhibit No. 2 was accepted in the evidence room on October 17, 1979, but that this was an error; the exhibit had been confiscated on that date, but was received in the evidence room on October 26, 1979. R-563-7.

The next witness was Michael Bowden, a police officer. He testified that he conducted surveillance of the October 15, 1979 and the October 16, 1979 transactions. R-598-601, 605-9. Bowden brought People's Exhibit No. 1 back to

the police station at about 3:00 on October 15, put it in an evidence locker, kept the key, opened the locker on the morning of October 16, removed the exhibit, and gave it to Hutchings, the evidence officer. R-603-5. He received People's Exhibits Nos. 2 and 3 on October 16, placed them in an evidence lacker, retained the key, opened the locker the following morning, took the exhibits to the Northern Illinois Crime Laboratory, and gave them to David Stroz. R-613-4.

Bowden also testified that he had received People's Exhibit No. 4 on October 5, 1979, that he put it in an evidence locker, retained the key, opened the locker the following Monday, October 8, 1979, removed the exhibit and gave it to Hutchings. R-615-6. He received People's Exhibit No. 5 on October 10, 1979, placed it in an evidence locker, retained the key, removed the exhibit the following day and gave it to Hutchings. R-618-9. The prosecutor then asked when Bowden turned over Exhibit No. 5 to Hutchings; Bowden stated that he believed it was the following day, but that he would have to check his reports or the crime lab sheet to be certain. The prosecutor sought to refresh Bowden's recollection, and the defense counsel objected. Judge Hoogasian then continued the case until that afternoon, and said "You don't talk with them. They don't talk with you about this case." R-619-20.

When proceedings resumed, defense counsel stated that "Once again I am informed that [the prosecutor] has been talking to a witness," Officer Bowden. R-622. The prosecutor stated that he asked Bowden for police reports from October 5 and 10, 1979. R-622, 628. Bowden stated that the prosecutor had not talked with him, but that he had told the prosecutor "that I wasn't pleased with the fact that I was getting my butt chewed out." R-623. Lovinger testified that he heard the prosecutor ask Bowden

about police reports for October 5 and 10 and that Bowden said he was not sure he wrote any and did not have them with him, and that a little later he heard the prosecutor and Bowden talking about the key to the evidence locker. R-626-7. Judge Hoogasian asked the prosecutor for the reports, and stated "I'm not going to have any case with any tint of error, and we are starting to have a lot of error creep into this record." R-629. A short recess was then taken.

When proceedings resumed, Judge Hoogasian made the following statement:

> Is everybody in court? Let the record show that the Defendant is present in open court and in his own proper person, with Robert P. Will, his attorney. That the People are represented by Steven McCullom.
>
> Gentlemen, at this time I want to put something on the record. I have not been satisfied with the way this case has been presented. First, I call to the attention of everybody in this courtroom that because of the laxity of the prior State's Attorney and his administration, there was nothing done to resolve this cause of action before a jury or bench trial because of the fact that this matter had occurred in 1979.
>
> Secondly, I am concerned about the lack of discovery afforded the defense, pursuant to court order of Judge Doran, and even of this court.
>
> Third, there was failure to fully comply with the orders of the Court during trial regarding discovery. For example, I point out to my order of September 7th and the fact that a witness in this cause did remove portions from Group Exhibit No. 2, for identification, when I had ordered all of the exhibits to be taken to the defense chemist for purpose of analysis, pursuant to the order of discovery.

Fourth, I am very much concerned about what occurred early this afternoon in this courtroom. And this can be classified as either direct or indirect contempt, and I'm not going into that phase of it. Because of the talking about a pending matter with a witness who says he did not talk with the Assistant State's Attorney, and the Assistant State's Attorney saying to me that he did not talk with the witness, except for request by Bob Will, representing the Defendant and then you changing your conversation after Lovinger under oath indicated certain things. And then you said something else contrary, and it's all on the record.

At this point, in the trial, it is questionable, and I doubt whether discovery has been completed by the State to the defense.

And further it has been disclosed by the witness on the stand, when he said, "I told him I was not pleased with the fact I was getting my butt chewed out, but that was it."

I, as the Court, am wholly unaware of any—I'm sorry. I am only aware of a reprimand by anyone except my admonition to the witness, to the defense and to the Assistant State's Attorney, not to discuss this case with anyone. And prior to I continuing this matter this morning, I said, "I am going to continue this case to 1:30. You don't talk with them; they don't talk with you about this case. Again I'm going to advise, let's get everything in order."

I feel error has crept into this trial and it can only be resolved by me declaring a mistrial, which I so order, and I recuse myself from this case, and I order you to appoint another judge. Call the Clerk. And the only other judge that will not take this is Strouse, because he had recused himself before. And after it is assigned to another judge, I instruct you to go to the other judge and let him set it for trial. Bond is continued.

R-630-2. As Judge Hoogasian finished the statement, he left the courtroom. R-644.

I.

Lovinger argues that retrial is barred by the double jeopardy clause of the fifth amendment, made applicable to the states by the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 787 (1969). The double jeopardy clause protects a criminal defendant's "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). Society, however, has an interest in trying a defendant in a fair trial ending in a just judgment. *Id.* These interests must be balanced. Thus, when a defendant's conviction is reversed on grounds other than insufficient evidence, the double jeopardy clause does not bar retrial. *United States v. Scott*, 437 U.S. 82, 90-1 (1978). Similarly, the double jeopardy clause does not always bar retrial after a mistrial.

II. *Consent*

When a defendant consents to a mistrial, retrial is barred only if the conduct of the State giving rise to the mistrial was intended to provoke a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). The State argues that Lovinger consented to the mistrial in the present case. A defendant must "affirmative[ly] consent" to the mistrial. *United States ex rel. Clauser v. McCevers*, 731 F.2d 423, 426 (7th Cir. 1984). Even where the defendant does not expressly request or consent to the mistrial, however, consent may sometimes be inferred. In determining whether there was consent, the court must look at all relevant circumstances. Thus, in *United States v. Goldstein*, 479 F.2d 1061 (2nd Cir.), *cert. denied*, 414 U.S. 873 (1973), the defendants

were tried for tax law violations. The trial judge declared a mistrial. The State sought to retry the defendants, but the trial court dismissed on double jeopardy grounds. *Id.* at 1062-4. On appeal, the court noted that the defendants had moved for and been denied a mistrial on grounds of jury deadlock two hours before the court declared a mistrial on the same grounds, that their position had not changed substantially in the interim, that they had done nothing during that period to indicate that they no longer sought a mistrial, and that they had an opportunity to object to the declaration of a mistrial but did not.[2] The court concluded that under the totality of the circumstances the defendants had consented to the mistrial. *Id.* at 1067-8.

In the present case, these factors weigh against finding consent. Lovinger's motion for a mistrial occurred after he brought to the court's attention a conversation between the prosecutor and Officer Hutchings. Initially, he did not make any motions. The judge stated that the conversation was improper but harmless, and that if Lovinger was moving for a mistrial, the motion was denied. Only then did Lovinger move for that Hutchings's testimony be stricken, that he be prohibited from testifying further, and for a mistrial. The judge denied all motions. R-451-7. Lovinger's motion for a mistrial was perfunctory, and he knew when he made it that it would be denied.

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[2] The Third Circuit has held that failure to object to a declaration of a mistrial waives challenges to the mistrial; in effect, consent is presumed. *United States v. Phillips*, 431 F.2d 949, 950-1 (3rd Cir. 1970). The Seventh Circuit has implicitly rejected this view. *See Clauser*, *supra*, 731 F.2d at 426. The Second Circuit considers failure to object as one factor among others probative of consent. *Goldstein*, *supra*, 479 F.2d at 1067 n. 11.

Moreover, Lovinger sought the mistrial on grounds different from those for which Judge Hoogasian declared the mistrial. Lovinger sought a mistrial because of an improper conversation between the prosecutor and Officer Hutchings. Judge Hoogasian declared the mistrial because of undue delay in bringing the case to trial, the prosecution's failure to grant full discovery and obey court discovery orders, and the prosecutor's improper conversation with Officer Bowden. Judge Hoogasian made no reference to the prosecutor's earlier conversation with Hutchings. Admittedly, the impropriety involved in both conversations was similar; but the mistrial was declared because of a different conversation from the one for which Lovinger sought a mistrial.

Lovinger did not withdraw his motion for mistrial or otherwise expressly indicate he no longer thought mistrial was necessary. *Cf. United States v. Kwang Fu Peng*, 766 F.2d 82, 85 (2nd Dist. 1985); *United States v. Mastrangelo*, 662 F.2d 946, 950 (2nd Dist. 1981), *cert. denied*, 456 U.S. 973 (1982); *United States v. Evers*, 569 F.2d 876, 878 (5th Cir. 1978) (express withdrawals of motions for mistrial). However, his position did change between the time at which he moved for mistrial and the time at which a mistrial was declared. At the time of Lovinger's motion, Officer Hutchings was testifying concerning the chain of custody. At that point, he had testified both that People's Exhibit No. 1 had not left his custody between September 14, 1982 and November 18, 1982, R-418-9, and that he had turned over People's Exhibits Nos. 1 and 2 to Walter Williams on November 4, 1982, who returned the exhibits on November 9, 1982. R-440-1. The conversation which led to Lovinger's motion for mistrial was apparently intended to held resolve this discrepancy. When he resumed the stand, Hutchings offered a third version, that he had

turned over Exhibits 1 and 2 to the prosecutor on November 3, 1982 and that Walter Williams had returned them on November 9, 1982. R-461-5. His testimony regarding the chain of custody of Exhibit No. 4 was confused and contradictory, R-498-50, and his testimony concerning the procedures for storing evidence when the evidence officer was gone, R-538-41, was inconsistent with Officer Bowden's testimony of how he had stored evidence in such cases. R-603-5, 613-4. The inconsistencies and confusion in Hutchings' testimony were not corrected by the conversation, but continued; Lovinger's need for a mistrial because of the conversation was correspondingly reduced.

The mistrial was precipitated when Lovinger brought to the court's attention a conversation between the prosecutor and Officer Bowden. His actions were similar to those he took in response to the earlier conversation. Given the similarity in the objectionable conduct (conversations between the prosecutor and witnesses possibly concerning contradictions in their testimony), it might be argued that by bringing the second conversation to the court's attention, Lovinger was also implicitly renewing the motion for a mistrial which he had made after the earlier conversation.

When he brought the first conversation to the court's attention, however, Lovinger did not initially make any motions. Although he stated that Hutchings' testimony would be tainted by the conversation, he would not necessarily have wanted a mistrial. By bringing the matter to the court's attention and putting it on the record, he might discredit Hutchings' subsequent testimony. It was only after Judge Hoogasian ruled that the conversation was harmless and if Lovinger was moving for a mistrial, the motion was denied, that Lovinger moved for a mistrial. Before he did so, however, he moved that Hutch-

ings' testimony be stricken in its entirety, and that he be precluded from testifying further; only after these motions were denied did Lovinger seek a mistrial. R-451-6. In light of this rather ambiguous sequence of events, it is difficult to conclude that in bringing the second conversation to the court's attention Lovinger was renewing his earlier motion for a mistrial.

The mistrial was declared in an abrupt manner. The judge recited problems with the trial, then declared a mistrial; he left the courtroom as he was declaring the mistrial. R-644. Lovinger thus had little opportunity to object to the mistrial, and his failure to do so should not weigh heavily in favor of finding consent. *See Gori v. United States*, 367 U.S. 364, 365 n. 6 (1961) ("In light of our disposition, we need not reach the Government's suggestion that petitioner's failure to object to the mistrial adversely affects his claim. We note petitioner's argument that, because of the precipitous course of events, there was no opportunity for such objection."); *United States v. Jorn*, 400 U.S. 470, 487 (1971) (plurality opinion); *Cf. United States v. Smith*, 621 F.2d 350, 351-2 (9th Cir. 1980) *cert. denied*, 449 U.S. 1087 (1981) (finding consent where, after the judge declared a mistrial but before he dismissed the jury, the judge and attorneys held a discussion in which retrial was anticipated and no objections were made to the mistrial).

Finally, when the judge declared a mistrial, he made no reference to Lovinger's earlier motion for a mistrial and did not state that it was declaring a mistrial at Lovinger's request or with his consent. *Cf. United States v. Crouch*, 566 F.2d 1311, 1315-6 (5th Cir. 1978) (trial judge's statement that he declared mistrial at defendant's request is unreviewable).

Under the totality of the circumstances in the present case, Lovinger did not consent to the mistrial. He did move for a mistrial, but his motion was made four days before the mistrial was declared, and on different grounds. In declaring the mistrial, Judge Hoogasian did not refer to the earlier motion. Lovinger's position may have improved between the times of his motion for a mistrial and the court's declaration of a mistrial. He did not object to the declaration of a mistrial, but had no real opportunity to do so.

Accordingly, it is necessary to determine whether the mistrial was manifestly necessary.

III. *Manifest Necessity*

A defendant may be retried after a mistrial to which he did not consent if the mistrial was "manifestly necessary."[3] *Washington, supra*, 434 U.S. at 505 (1978). There are no rigid, mechanical formulas for determining whether a mistrial was manifestly necessary; the court must consider the particular facts in the case before it. *Illinois v. Somerville*, 410 U.S. 458, 462 (1973). The trial court must make the initial determination of manifest necessity, and considerable deference is usually due its decision.[4]

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[3] (Footnote 3, because of its length, is at end of text.)

[4] The degree of deference accorded to the trial judge's determination of manifest necessity depends at least in part on the degree of familiarity of the trial judge with the factors relevant to the determination. In cases of jury deadlock, or juror bias, greater deference is justified by the trial judge's greater familiarity with the facts. *Washington, supra*, 434 U.S. at 510 n. 28, 513-4. However, the Court also stated that

> the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence,

(Footnote continued on following page)

Clauser, supra, 731 F.2d at 426. Thus, the trial court need not make an express finding of manifest necessity, nor need it give the reasons for its decision. *Washington, supra*, 434 U.S. at 526-7.

The trial judge must exercise his discretion soundly, however *Jorn, supra*, 400 U.S. at 486-7; *Washington, supra*, 434 U.S. at 514. Moreover, although the trial judge need not state his reasons for declaring a mistrial, the presence of obviously adequate alternative remedies less harsh than mistrial miitates against a finding of manifest necessity. *See Jones v. Hogg*, 732 F.2d 53, 56 n. 1 (6th Cir. 1984); *United States v. Sanders*, 591 F.2d 1293, 1298 (9th Cir. 1979); *United States v. Sartori*, 730 F.2d 973, 974-7 (4th Cir. 1984); *Cf. Abdi v. State of Georgia*, 744 F.2d 1500, 1503 (11th Cir. 1984), *cert. denied*, 471 U.S. 1006 (1985) (manifest necessity for a mistrial can exist where there were less drastic alternatives, so long as the record shows that the trial court considered them before declaring mistrial).

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[4] *continued*

or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.

Id. at 508 (footnotes omitted). This language suggests that where prosecutorial misconduct or conscious decisions, *see Downum v. United States*, 372 U.S. 734, 737-8 (1963), cause the mistrial, the trial judge's determination of manifest necessity may be entitled to less deference. *Cf. Somerville, supra*, 410 U.S. at 459-60 (prosecutorial error in framing indictment resulted in manifest necessity for mistrial)' *Clauser, supra*, 731 F.2d at 424-31 (police perjury of which prosecution was unaware, resulting in defective indictment, created manifest necessity for mistrial). In the present case, the mistrial was declared because of misconduct by the prosecutor; a lesser degree of deference may therefore be due the trial judge's (implicit) finding of manifest necessity for mistrial.

In the present case, the trial judge stated several reasons for declaring a mistrial. These were the three-year delay in bringing the case to trial, the lack of discovery afforded the defendant, the failure of the prosecution to comply with court discovery orders, and the prosecutor's conversation with Officer Bowden during a recess. Neither these reasons nor any other reasons apparent in the record created a manifest necessity for mistrial.

Delay

Lovinger was arrested on October 16, 1979, and charged in January with delivering cocaine and cannabis. His trial began in November 1982. Conceivably this delay could have prejudiced Lovinger. Lovinger, however, apparently never objected to the delay. Even if there were prejudice, however, it is difficult to see how a mistrial followed by further delay would cure that prejudice.

Discovery

The record reveals several instances arguably involving noncompliance or delay in obeying discovery charges. Any prejudice, however, was minimal. Thus, Judge Hoogasian ordered that Lovinger's expert be permitted to test all three bags of powder in People's Exhibit No. 2, but the expert was given only a sample drawn from one bag. R-60-1. When this fact was brought out, the court ordered that the expert be permitted to test all three bags, and the trial was continued until this was done. R-62-4. At another point, cross-examination of Officer Hutchings revealed that a log book was kept recording each time evidence entered and left the evidence room; this log book had not been specifically sought or requested in discovery. Judge Hoogasian granted a half-hour recess so that de-

fense counsel could examine the log book and cross-examination then resumed. R-549-50. During the court's hearing on the prosecutor's conversation with Officer Bowden, it was revealed that Lovinger had not been given the police reports for October 5 and 10 during discovery. R-628-9.

Suppression by the State of exculpatory evidence material to guilt or punishment violates a criminal defendant's due process rights. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Pretrial disclosure, however, is not required; the defendant's rights are violated only if "the disclosure came so late as to prevent the defendant from receiving a fair trial." *United States v. Sweeney*, 688 F.2d 1131, 1141 (7th Cir. 1982) (quoting *United States v. McPartlin*, 595 F.2d 1321, 1346 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979).)

The discovery violations in the present case did not prevent Lovinger from receiving a fair trial. All the material was available for use in cross-examination of the prosecution's witnesses. If Lovinger needed more time to prepare for cross-examination a continuance could have been granted. *See United States v. Williams*, 738 F.2d 172, 178-9 (7th Cir. 1984). In his declaration of a mistrial, Judge Hoogasian pointed to no harm resulting from the prosecution's failure to obey discovery orders promptly, and this court can perceive none.

Conversations with Witnesses

A private conversation between a prosecutor and a State witness while the witness is testifying is not improper per se. *See* 23 CJS *Criminal Law* § 1025 (1961). Thus, where the defense counsel raised unexpected matters in his opening statement, the court did not commit error in permitting the prosecutor to speak privately with

the government's first witness on the witness stand, although admonishing him not to discuss testimony the witness has already given. *United States v. Mandell*, 525 F.2d 671, 679 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976). Such conversations do, however, create a potential for the prosecutor to influence the witness' testimony, and should be strictly scrutinized. Where the conversations are not authorized by the court and engaged in for some legitimate reason, but are in direct defiance of court orders, the potential for prejudice to the defendant may be significant.

The prosecutor had two conversations with State witnesses. In the first conversation, during a recess after inconsistencies had developed in Officer Hutchings' testimony, the prosecutor looked over Hutchings' records and asked Hutchings to review them. The court found that although the conversation was improper, it would not taint Hutchings' testimony since he had been testifying from his records anyway, and the court therefore would not require that Hutchings' testimony be stricken or a mistrial declared. R-455-7. This finding is supported by the record; nothing indicates that Hutchings' testimony would have been altered by the conversation.

The second conversation was precipitated when during a recess the defense counsel asked the prosecutor for police reports for October 5 and 10. The prosecutor asked Officer Bowden, who had been testifying, for the reports; Bowden may have criticized Judge Hoogasian. R-623, 626, 628.

It is unlikely that Lovinger would have been prejudiced by this part of the conversation. Bowden had been testifying about the events of October 5 and 10. But the prosecutor did not review his testimony, or have him read the police reports; he merely asked him for the reports.

It is difficult to see how this conversation could have influenced Bowden's testimony. It was as harmless as the earlier conversation, and would not justify a mistrial.

Bowden and the prosecutor, however, also may have discussed the procedures for using the key to the lockers outside the evidence room. After the recess, Lovinger testified that after hearing the earlier part of the conversation,

> And I kind of strolled past. And when I strolled past again, I wasn't standing over there, standing listening. I heard something about the key to the evidence locker and I heard that being said . . .
>
> I heard [the prosecutor] Bowden's office about the key and the evidence locker. I didn't hear anything more than that.

R-626-7.

Bowden testified that the conversation involved only the prosecutor's request for the police reports and Bowden's statement that he was displeased with the judge's criticisms of him. R- 623. The prosecutor denied that he had any conversation with Bowden regarding the key or evidence locker. R-628. Judge Hoogasian did not make any express finding as to which version of the conversation was correct.

If this part of the conversation occurred, it might have resulted in significant prejudice to Lovinger. Bowden's testimony about the procedures involving the keys to the evidence lockers would be important in establishing the chain of custody of the substances obtained from Lovinger, and his testimony was inconsistent with Hutchings' earlier testimony about the procedures for using the lockers. The prosecutor's conversation with Bowden could have improperly influenced Bowden's future testimony and helped him resolve this conflict.

If he thought the conversation might have influenced Bowden's testimony, however, Judge Hoogasian had several options less severe than declaring a mistrial. He could have stricken Bowden's testimony in its entirety, or forbidden him to testify further, or allowed him to continue to testify, and stricken his testimony if it diverged from his earlier testimony so much that it would be reasonable to infer that the later testimony had been influenced by the conversation. Such actions would have preserved Lovinger's "valued right to have his trial completed by a particular tribunal," *Wade, supra*, 336 U.S. at 689, while eliminating the potentially tainted testimony.

The presence of alternatives does not mean a mistrial was not manifestly necessary. The trial judge is granted considerable discretion in determining whether a mistrial is necessary, and if reasonable judges could differ and the record indicates that "the trial judge . . . carefully considered the alternatives and did not act in an abrupt, erratic or precipitate manner," his determination should be upheld. *Grandberry v. Bonner*, 653 F.2d 1010, 1014 (5th Cir. 1981) (en banc); *see Abdi, supra*, 744 F.2d at 1503.

In the present case, Judge Hoogasian declared the mistrial abruptly and without considering alternatives. A mistrial would have been a reasonable option only if he credited Lovinger's version of the conversation; but Lovinger's version was vague, and he was within hearing range of the conversation only momentarily, and both parties to the conversation contradicted Lovinger's testimony. Any careful consideration of whether a mistrial was necessary would have had to begin with an attempt to resolve this conflicting testimony; but Judge Hoogasian made no such attempt. After a short recess following the conclusion of the mini-hearing on the conversation, he made a short statement about the problems that had occurred in the trial, declared a mistrial, and left the courtroom. He

made no reference to possible alternatives to mistrial or to the potential double jeopardy problems of mistrial. *See Grandberry, supra*, 653 F.2d at 1015-16; *United States v. Starling*, 571 F.2d 934, 939-41 (5th Cir. 1978). Under the circumstances of this case, where Judge Hoogasian acted abruptly and did not consider the alternatives to mistrial, the incident giving rise to the mistrial may not have occurred, and even if it did, there were adequate alternative remedies, the mistrial was not manifestly necessary. *See United States v. Sartori*, 730 F.2d 973, 975-7 (4th Cir. 1984).

For the reasons stated above, Lovinger's petition for writ of habeas corpus should be granted.

/s/ Elaine E. Bucklo
United States Magistrate

DATED: December 17, 1986

Written objection to any finding of fact, conclusion of law, or the recommendation for disposition of this matter must be filed with the Honorable Charles R. Norgle within ten (10) days after service of this Report and Recommendation. *See* Fed.R.Civ.P. 72(b). Failure to object will constitute a waiver of objections on appeal.

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[3] In *Richardson v. United States*, 468 U.S. 317, 326 (1984), the Supreme Court held that a trial court's declaration of a mistrial following a hung jury does not terminate the defendant's original jeopardy, and consequently the double jeopardy clause does not bar retrial. This holding, however, does not bar all double jeopardy challenges to retrial following mistrial. The court's holding reflected the longstanding rule allowing retrial in such cases; it does not necessarily apply when the mistrial was declared for other reasons:

> The case law dealing with the application of the prohibition against placing a defendant twice in jeopardy following a mistrial because of a hung jury has its own sources and logic. It has been established for 160 years, since the opinion of Justice Story in *United States v. Perex*, 9 Wheat. 579 (1824), that a failure of the jury to agree on a verdict was an instance of "manifest necessity" which permitted a trial judge to terminate the first trial and retry the defendant . . . Since that time we have had occasion to examine the application of double jeopardy principles to mistrials granted for reasons other than the inability of the jury to agree . . . Nevertheless, we have constantly adhered to the rule that a retrial following a "hung jury" does not violate the Double Jeopardy Clause.

Id. at 323-4.

The Court has recognized that in some circumstances a mistrial can bar reprosecution. Thus, in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), the Court recognized that the double jeopardy clause requires that the defendant's original jeopardy terminate. *Id.* at 309, but also noted, citing *United States v. Scott*, 437 U.S. 82 (1978), that the clause prohibits retrial after mistrial in some circumstances. *Id.* at 307 n. 6. *Scott* stated that such retrials are not barred when the mistrial was manifestly necessary. *Id.* at 92-3. *See also Illinois v. Somerville*, 410 U.S. 458, 461-3 (1973); *Arizona v. Washington*, 434 U.S. 497, 505-14 (1978); *United States v. Jorn*, 400 U.S. 470, 479-87 (1971) (plurality opinion). *Richardson* cannot be read as creating a per se rule that retrial is not barred after mistrial; if there was no manifest necessity for the mistrial, retrial is ordinarily still barred. *See United States v. Jarvis*, 792 F.2d 767, 769 (9th Cir. 1986).

Even when the trial court declares a mistrial on grounds of jury deadlock, double jeopardy challenges to retrial will not always be foreclosed. The defendant cannot argue that a mistrial because of a hung jury precludes retrial; he can, however, argue that the jury was not deadlocked, and that the trial court abused its discretion in finding that it was. In such a case, *Richardson* would not apply,

(Footnote continued on following page)

[3] *continued*
because the mistrial was in fact not declared because of a hung jury; consequently, in considering double jeopardy challenges to retrials after mistrials declared for jury deadlock, courts will examine whether the trial judge abused his discretion in declaring a mistrial. *See Walker v. Weldon*, 744 F.2d 775, 777-9 (11th Cir. 1984); *Fay v. McCotter*, 765 F.2d 475, 477-8 (5th Cir. 1985); *Cf. United States v. Brack*, 747 F.2d 1142, 1146, 1148 (7th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985) (defendant's first trial ended in hung jury; retrial therefore not barred, but defendant apparently did not argue that the trial judge abused his discretion in declaring mistrial).

130 Ill.App.3d 105
85 Ill.Dec. 381

**The PEOPLE of the State of Illinois,
Plaintiff-Appellee,**

v.

**Jeffrey LOVINGER,
Defendant-Appellant.**

No. 83-330.

Appellate Court of Illinois,
Second District.

Jan. 17, 1985.

Defendant filed motion to dismiss charges based on former jeopardy. The 19th Circuit Court, Lake County, Jack Hoogasian, J., denied his motion, and he filed an interlocutory appeal. The Appellate Court, Schnake, J., held that defendant consented to mistrial, and thus jeopardy did not bar further prosecution.

Affirmed and remanded.

SCHNAKE, Justice:

This is an interlocutory appeal by the defendant, Jeffrey Lovinger, under Supreme Court Rule 604(f) (94 Ill.2d R. 604(f)), from an order of the circuit court of Lake County, denying his motion to dismiss the charges against him based on former jeopardy.

The defendant was originally charged by information with the following three illegal drug deliveries; (1) October 15, 1979, delivery of less than 30 grams of a substance containing cocaine (Class 2 felony) (Ill.Rev.Stat.1979, ch.

56 ½, par. 1401(b)); (2) October 16, 1979, delivery of 30 grams or more of a substance containing cocaine (Class X felony) (Ill.Rev.Stat.1979, ch. 56 ½, par. 1401(a)(2)); and (3) October 16, 1979, delivery of more than 2.5 but not more than 10 grams of a substance containing cannabis (Class A misdemeanor) (Ill.Rev.Stat.1979, ch. 56 ½, par. 705(b)). The case proceeded to a bench trial, and the trial judge declared a mistrial on his own motion during the State's case-in-chief. The case was then assigned to another judge who denied the defendant's motion to dismiss based on former jeopardy. A detailed statement of the proceedings at trial is essential to an exploration of the issue of double jeopardy.

The defendant, Jeffrey Lovinger, was arrested on October 16, 1979, and was subsequently charged by information with delivering cocaine to an undercover police officer named Paula Riccio on October 15, 1979, and delivering cocaine and cannabis to Riccio on the following day.

On September 7, 1982, prior to trial, an order was entered on the defendant's motion, requiring that "the evidence" in the case be transported to a laboratory in Glen Ellyn, and that "a portion of said evidence be analyzed [by the defendant's expert] in the presence of a chemist from the Northern Illinois Police Crime Laboratory." As explained hereinafter, it became apparent at trial that this order was not complied with.

The matter proceeded to a bench trial on November 3, 1982. On that date the defendant filed his response to the court's earlier order for discovery, indicating his intention to raise the defense of entrapment.

Paula Lemke, formerly Riccio, the undercover police officer named in the information, testified for the State about the deliveries on October 15 and 16, and about her

part of the chain of custody regarding the alleged controlled substances. According to Lemke, the delivery on October 15 was made in Lovinger's car which was parked in the parking lot of Goodman's Restaurant in Highland Park. She and Lovinger had just lunched together in the restaurant. They had previously arranged to meet at Goodman's in order to consummate the drug transaction. The delivery on October 16 took place in Lovinger's apartment in Waukegan. Arrangements for this transaction were made during the earlier delivery at Goodman's and in subsequent telephone conversations. Immediately after the transaction on October 16, Lovinger was arrested along with a codefendant not involved in this appeal, Stanley Blackowicz. The purported cocaine delivered on October 15 was contained in a plastic bag identified by Lemke as part of People's Exhibit 1.The purported cocaine delivered on October 16 was contained in three plastic bags which she identified as People's Exhibits 2A, 2B and 2C. The alleged marijuana delivered on October 16 was contained in a plastic bag which was part of People's Exhibit 3.

During cross-examination of Lemke, it became apparent that the court's order of September 7, 1982, regarding analysis of the evidence by the defendant's expert, had not been carried out. The expert would not analyze the evidence in the presence of a chemist from the crime lab, apparenty because he wanted to dry the substances overnight to determine their weight accurately. Subsequently, without any modification of the prior court order regarding analysis of the evidence by the defendant's expert, samples from the exhibits were taken to the defendant's expert and tested. Lemke testified, however, concerning the purported cocaine delivered on October 16, that the sample was taken from only one of the three

plastic bags. On motion of the defendant the bench trial was continued so that the defendant's expert could analyze the substance in the other two plastic bags.

The bench trial resumed on Monday, January 31, 1983, and continued all that week, and the first two days of the next. Lemke's cross-examination included questions about two other deliveries of purported cocaine by Lovinger to her on October 5 and 10, 1979. Presumably, these transactions were brought up by the defense with a view toward the anticipated entrapment defense. The purported cocaine delivered on October 5 and 10 was identified by Lemke as part of People's Exhibits 4 and 5, respectively.

Other police officers testified about surveillance they commenced at the scenes of the transactions, the arrest of Lovinger and Blackowicz after the transaction on October 16, during which Blackowicz was observed trying to flush down the toilet the money Lemke paid for the substances, and the chain of custody concerning the exhibits. The State's chemist testified about his analysis of the evidence, and his findings supported the charges against the defendant. Most of the eight days of trial were spent on chain of custody.

During the direct examination of Officer Hutchings, evidence officer for the Waukegan Police Department, a discrepancy developed regarding the chain of custody of People's Exhibit 1, the substance allegedly delivered on October 15. The court called a recess so that the prosecutor could "get [his] act together."

Following the recess, defense counsel informed the court that during the recess the prosecutor and the witness had been passing papers back and forth between them and had appeared to be discussing the case. Defense counsel

stated that the prosecutor did not have a right to discuss the witness' testimony with him during a recess taken during said testimony. Defense counsel suggested that "the remaining testimony by this witness will have been tainted by the discussion."

The prosecutor told the court that he did not tell Hutchings how to testify. In fact, he advised, he told Hutchings they could not discuss his testimony. The prosecutor simply asked for Hutchings' records, reviewed them, and asked Hutchings to review his records and to testify from memory.

The judge then stated that it was improper for the prosecutor to talk with his witness during the recess, but that any error was harmless because Hutchings had been referring to his records throughout his testimony. The judge concluded his remarks by saying, "[T]here will be no further conversation, and if there is a motion for mistrial, that motion is denied." Defense counsel then moved to have Hutchings' testimony stricken, and to bar Hutchings from testifying further. When these motions were denied, defense counsel moved for a mistrial, which motion was also denied, and Hutchings' testimony continued. Prior to an overnight recess during his direct examination, the court admonished Hutchings not to discuss his testimony with any lawyers or anyone else because "we don't want any mistrial to occur."

Part of Hutchings' cross-examination concerned the method by which evidence was generally processed at the Waukegan Police Department. Hutchings testified as follows: There are evidence lockers located outside the booking room. Each locker has two keys, one kept in Hutchings' office, and the other kept in the locks of the lockers. When an officer seizes evidence, he places it in one of

the lockers which he then locks. The officer then places the key through a slot into another locker which is kept locked. Hutchings keeps both keys for that locker. When Hutchings gets to work in the morning, he opens the locker with the keys, and then uses those keys to retrieve the evidence out of the other lockers. He then takes the evidence to his office. On redirect examination, Hutchings stated, among other things, that it is possible for an officer to keep the key once he has placed evidence in a locker. Under those circumstances, Hutchings does not take the evidence out of the locker and into his office.

The State's next witness was Officer Bowden who testified about the surveillance he conducted of the transactions on October 15 and 16, and about his part of the chain of custody of the physical evidence. During his direct examination he testified that he had handled the substances delivered on October 5, 10, 15, and 16 and in each case he received the evidence from Lemke and locked it in one of the evidence lockers described by Hutchings. Bowden, however, kept the key. He did not place it in the locker with the slot for keys described by Hutchings. In each case Bowden subsequently retrieved the evidence from the locker himself and gave it to the next person in the chain of custody. Regarding the purported cocaine delivered on October 10, Bowden testified that he received it from Lemke and locked it in an evidence locker on October 10. On *the following day* he retrieved it and turned it over to Hutchings. (Hutchings had previously testified that Bowden gave that evidence to him on October 10.) The prosecutor then asked Bowden, "When did you turn it over to Officer Hutchings?" and Bowden replied that he thought it was the following day, but he would have to see his records to be sure. When the prosecutor asked him if there was anything that would refresh his recollec-

tion, defense counsel objected. The court told the prosecutor not to correct the witness and called a recess, stating "You [presumably Officer Bowden] don't talk with them [presumably the lawyers]. They don't talk with you about this case. Again, I'm going to advise, let's get everything in order."

Following the recess, defense counsel stated to the judge "[O]nce again I am informed that [the prosecutor] has been talking to a witness." The judge asked the prosecutor if he had talked to Bowden, and the prosecutor first replied, "Not about this case, no." He subsequently told the judge that "[t]he only thing I said to him was, 'Do you have any police report on the 5th or 10th.' ". During the recess defense counsel had asked the prosecutor for the police reports concerning those dates. The prosecutor told the judge that he did not talk to Bowden about his testimony.

When Bowden entered the courtroom, the judge asked him if the prosecutor had talked with him during the recess. Bowden first told the court that he had not, and then said, "I told him that I wasn't pleased with the fact I was getting my butt chewed out. But that was it.

The defendant then testified to a third version of the conversation. He said that during the recess he overheard the prosecutor ask Bowden if he wrote any police reports concerning the 5th and 10th of October. Bowden replied that he was not sure whether he did or not. Lovinger subsequently heard something about the key to the evidence locker. Defense counsel had stated earlier that Lovinger told him that the prosecutor asked Bowden why he did not "follow the procedure with respect to that key," and that Bowden replied that he was "not supposed to use that key."

The court then asked the prosecutor to let him see the police reports from October 1 and 10, and the prosecutor replied that he did not have them. The court then ordered him to get the reports and called a recess.

Following the recess, the judge declared a mistrial on his own motion, stating:

> "Gentlemen, at this time I want to put something on the record. I have not been satisfied with the way this case has been presented. First, I call to the attention of everybody in this courtroom that because of the laxity of the prior State's Attorney and his administration, there was nothing done to resolve this cause of action before a jury or bench trial because of the fact that this matter had occurred in 1979.
>
> Secondly, I am concerned about the lack of discovery afforded the defense, pursuant to court order of Judge Doran, and even of this court.
>
> Third, there was failure to fully comply with the orders of the Court during trial regarding discovery. For example, I point out to my order of September 7th and the fact that a witness in this cause did remove portions from Group Exhibit No. 2, for identification, when I had ordered all of the exhibits to be taken to the defense chemist for purpose of analysis, pursuant to the order of discovery.
>
> Fourth, I am very much concerned about what occurred early this afternoon in this courtroom. And this can be classified as either direct or indirect contempt, and I'm not going into that phase of it. Because of the talking about a pending matter with a witness who says he did not talk with the Assistant State's Attorney, and the Assistant State's Attorney saying to me that he did not talk with the witness, except for request by Bob Will, representing the Defendant and then you changing your conversation after Lovinger under oath indicated certain things. And then you said something else contrary, and it's all on the record.

> At this point, in the trial, it is questionable, and I doubt whether discovery has been completed by the State to the defense.
>
> And further it has been disclosed by the witness on the stand, when he said, 'I told him I was not pleased with the fact I was getting my butt chewed out, but that was it.'
>
> I, as the Court, am wholly unaware of any—I'm sorry. I am only aware of a reprimand by anyone except my admonition to the witness, to the defense and to the Assistant State's Attorney, not to discuss this case with anyone. And prior to I continuing this matter this morning, I said, 'I am going to continue this case to 1:30. You don't talk with them; they don't talk with you about this case. Again I'm going to advise, let's get everything in order.'
>
> I feel error has crept into this trial and it can only be resolved by me declaring a mistrial, which I so order, and I recuse myself from this case, and I order you to appoint another judge. Call the Clerk. And the only other judge that will not take this is Strouse, because he had recused himself before. And after it is assigned to another judge, I instruct you to go to the other judge and let him set it for trial. Bond is continued."

This statement of the judge concluded the hearing on that date.

The defendant subsequently filed a motion to dismiss based on former jeopardy. During argument on the motion defense counsel stated that he had received the police reports relating to October 5 and 10 prior to the mistrial declaration. When the judge declared the mistrial, as he made his final comments, he was "getting up and walking out the door, and that's the end of the proceedings, and that's how it terminated."

The judge to whom the matter was reassigned denied the defendant's motion to dismiss, found that there was a "manifest necessity" for the mistrial declaration, explaining, "The overriding thing of the trial judge, it appears to this court, is the fact of concern of error creeping into the record. This is repeated. An error, of course, would destroy a fair trial."

In his motion to dismiss because of former jeopardy, the defendant relied on the double jeopardy clause of the Federal Constitution, article I, section 10 of the Illinois Constitution, and Section 3-4(a)(3) of the Criminal Code of 1961.

The Federal constitutional provision provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *." (U.S. Const., amend. V.) This provision is applicable to criminal proceedings in state courts. *Benton v. Maryland* (1969), 394 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707.

Article I, section 10 of the Illinois Constitution provides, in pertinent part, "No person shall * * * be twice put in jeopardy for the same offense." Ill.Const.1970, art. I. sec. 10.

Section 3-4(a)(3) of the Criminal Code provides, in pertinent part:

> A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:
>
> * * * * * *
>
> (3) Was terminated improperly * * *, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts * * *.

Ill.Rev.Stat.1983, ch. 38, par. 3-4(a)(3).

On appeal the defendant bases his argument on the principles of double jeopardy as set forth in case law without making any distinctions between the provisions set forth above, presumably because there are none of any legal significance for purposes of this case.

The constitutional protection against double jeopardy includes the defendant's "valued right to have his trial completed by a particular tribunal * * *." (*Wade v. Hunter* (1949), 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974.) This right, however, is not absolute and "must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." (*Wade*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974.) The standard for determining whether a defendant may be retried following declaration of a mistrial over his objection is whether there was a "manifest necessity" for the mistrial declaration. (*Arizona v. Washington* (1978), 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717.) This standard "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial." (*Illinois v. Somerville* (1973), 410 U.S. 456, 462, 93 S.Ct. 1066, 1069, 35 L.Ed.2d 425.) As a general matter, however, a trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. (*Somerville*, 410 U.S. 458, 464, 93 S.Ct. 1066, 1070, 35 L.Ed.2d 425.) If the problem giving rise to the mistrial declaration could have been adequately corrected short of aborting the proceeding, however, the standard of "manifest necessity" has not been met, and retrial is barred. *People v. Phillips* (1974), 29 Ill.App.3d 529, 331 N.E.2d 163.

Where a defendant asks for or consents to the declaration of a mistrial, different principles come into play. (*Oregon v. Kennedy* (1982), 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416; *People ex rel. Mosley v. Carey* (1979), 74 Ill.2d 527, 25 Ill.Dec. 669, 387 N.E.2d 325, *cert. denied*, (1979), 444 U.S. 940, 100 S.Ct. 292, 62 L.Ed.2d 306.) Under such circumstances, retrial is barred only if the conduct giving rise to the mistrial declaration was intended to provoke a mistrial. *Kennedy*, 456 U.S. 667, 679, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416.

The defendant in the instant case argues that he did not consent to the mistrial, and that there was no manifest necessity for the mistrial declaration because the concerns cited by the trial judge when he declared the mistrial either had been or could have been adequately corrected with less drastic means.

The State, however, referring to the motion for mistrial made by the defendant during Hutchings' testimony (which motion was denied), and the defendant's failure to object when the judge declared the mistrial, maintains that the defendant consented to the mistrial declaration. The State also argues that the conduct of the prosecutor which caused the mistrial declaration was not intended to provoke a mistrial. Alternatively, the State contends that if the defendant did not consent to a mistrial, it was justified under the manifest necessity standard.

In reply the defendant maintains that silence in the face of a *sua sponte* declaration of mistrial by the court does not constitute consent. He maintains that he had no real opportunity to object because the judge "physically left the bench as he uttered those orders." Alternatively, he maintains that, if he did consent, retrial shoud be barred anyway because the prosecutor's conduct, in speaking to

the witness Bowden during the recess, was intended to provoke a mistrial so that the State would have another opportunity to try the case.

The parties have not cited, nor do we find, any Illinois cases on the question of whether a defendant's mere silence or failure to object amounts to consent to a mistrial declared on the court's motion, such that retrial is not barred absent prosecutorial or judicial conduct intended to provoke the mistrial. (*See People v. Bean* (1975), 26 Ill.App.3d 1090, 325 N.E.2d 679, *aff'd on other grounds* (1976), 64 Ill.2d 123, 355 N.E.2d 17.) There appears to be a split of authority on this question in other jurisdictions. (Annot., 63 A.L.R.2d 782 (1959).) Failure to object would not amount to consent where there is no opportunity to interpose an objection. *See United States v. Jorn* (1971), 400 U.S. 470, 487, 91 S.Ct. 547, 558, 27 L.Ed.2d 543.

In this case, however, there was more than silence on the part of the defendant. He had previously requested a mistrial when the prosecutor spoke to one of his witnesses, Officer Hutchings, about chain of custody during a recess taken during Hutchings' testimony. At that time defense counsel maintained that "the remaining testimony by this witness will have been tainted by the discussion." Although that motion was denied, it was again defense counsel who, following a recess taken during Officer Bowden's testimony, brought to the court's attention that "once again * * * [the prosecutor] has been talking to a witness [about chain of custody]." This discussion during the recess was one of the principal reasons for the court's *sua sponte* declaration of a mistrial. Under such circumstances, there are cases, not cited by the parties, that suggest that failure to object does amount to consent.

The case most similar to that before us is *People v. Montlake* (1918), 184 A.D. 578, 172 N.Y.S. 102. There the

defendants were charged with grand larceny in the first degree. A first trial ended in a mistrial because the prosecutor referred to defense counsel as the attorney for the "pickpocket trust" and a pickpocket himself. On the first occasion of such remarks, the defendants moved for a mistrial, which motion was denied, and the defendants excepted. On the second occasion they protested the remarks but did not move for a mistrial. On the third and final occasion, which was more flagrant than the others, the court declared a mistrial on its own motion without objection by the defense. The reviewing court concluded that the mistrial was declared with the defendants' consent, stating:

> "I think that [the court's] such action may well be regarded as a somewhat belated granting of defendants' said former motion for that relief. Defendants' exception to the denial of that motion still stood upon the record, and I think that defendants' counsel should then in clear terms have withdrawn that motion if he did not wish it granted." 172 N.Y.S. 102, 105.

More recently in *State v. Wolak* (1960), 33 N.J. 399, 165 A.2d 174, *cert. denied* (1961), 365 U.S. 822, 81 S.Ct. 710, 5 L.Ed.2d 701, the defendant was charged with first degree murder. His first trial resulted in a conviction which was reversed on appeal. During his retrial the prosecutor asked two witnesses to take the gun used in the killing, and to point it at him as the defendant had allegedly pointed it at the victim. The prosecutor then called the widow of the victim and directed her to hold the gun, stand up like the defendant had, and point it at anyone in the courtroom as if he were her husband to show the aim. The witness pointed the gun at the defendant. The prosecutor then asked her to whom she was pointing the gun, and she replied, "Wolak [defendant] that—." (165 A.2d 174, 175.) The defendant thereupon made a motion

for mistrial which was denied. The court instructed the jury to disregard the entire incident.

Three days later the court, outside the presence of the jury, informed counsel that it had decided to reconsider the defendant's motion for mistrial. Concluding that the demonstration by the victim's widow was prejudicial and would remain so regardless of his instructions to the jury, the judge ruled that he "must grant the motion made on behalf of the defendant for a mistrial." (165 A.2d 174, 175.) No objection was made by the defendant.

On appeal the defendant claimed that another retrial violated the double jeopardy provision of the New Jersey Constitution. The reviewing court disagreed, concluding that the defendant waived his right to go to verdict, stating:

> "The right of the trial court to reconsider and redetermine motions made during trial cannot be disputed. As in the instant case, the trial court did exactly that in [*Montlake*] * * *." 165 A.2d 174, 175.

Two similar cases are *People v. Bowman* (1971), 36 Mich. App. 502, 194 N.W.2d 36, and *Kamen v. Gray* (1950), 169 Kan. 664, 220 P.2d 160, *cert. denied* (1950), 340 U.S. 890, 71 S.Ct. 206, 95 L.Ed. 645. *See also People ex rel. Roberts v. Orenic* (1981), 88 Ill.2d 502, 59 Ill.Dec. 68, 432 N.E.2d 353 (defendant consented to mistrial where it was granted on his motion, even though, after it was declared, defense counsel stated he thought the mistrial should really be on the court's motion because the defense was not the cause of the mistrial); and *Sedgwick v. Superior Court for District of Columbia* (D.C.Cir.1978), 584 F.2d 1044, *cert. denied* (1979), 439 U.S. 1075, 99 S.Ct. 849, 59 L.Ed.2d 42 (defendant held to have consented to mistrial declared on court's own motion without objection where the defendant moved to dismiss the charge against him because of an

alleged violation of his right to pretrial discovery, arguing that his right to a fair trial was seriously undermined by the discovery problem).

The court in *Bowman* included the following words of caution about imputing a mistrial declared by the court to a prior motion by the defendant for mistrial where such motion had been denied:

> "We acknowledge the merit in the defendant's fear that by holding that a denial [of the prior motion] has no effect, any motion made by a defendant might be granted to his detriment at some later stage of the proceedings when his fortunes have changed. This, if allowed, would certainly dampen the efforts of the defendant's counsel to protect his client, making him fearful that any motion for a mistrial, though denied, may return to haunt him when the court decides to reverse its decision (perhaps because a prosecutor's case has not gone as well as it might have), and force the defendant into a second trial on a theory that the court was only finally doing what the defendant asked him to do." (194 N.W.2d 36, 40.)

The court in *Bowman* went on to conclude that such a situation was not presented in that case.

In the instant case, while the question may be a close one, this court holds that the defendant consented to the mistrial. The prior motion for mistrial was made by the defendant because the prosecutor talked to one of his witnesses, Officer Hutchings, about chain of custody during a recess taken during Hutchings' testimony. Defense counsel stated at that time his feeling that "the remaining testimony by this witness will have been tainted by the discussion." Moreover, the mistrial was declared by the court when defense counsel again brought to the court's attention another such discussion about chain of custody,

this time between the prosecutor and Officer Bowden during a recess taken during the latter's testimony. Under these circumstances, and in light of the authorities cited above, it was incumbent upon defense counsel to object to the court's mistrial declaration, if, in fact, the defendant wanted to go to judgment. While the defendant argues that there was no real opportunity to do so, counsel could well have asked for leave to state his objection during the course of the mistrial declaration. Had he done so, the mistrial declaration could have been rescinded as was done in *People v. Estrada* (1980), 91 Ill.App.3d 228, 46 Ill.Dec. 628, 414 N.E.2d 512.

Additionally, because this was a bench trial, the defendant might readily, at a later date, have filed a motion asking the court to reconsider its mistrial declaration. Had the motion been granted, the trial could have been resumed.

It is apparent that counsel initially spoke to Bowden in an effort to satisfy defendant's request for police reports of the October 5 and 10 transactions. Although, if Lovinger's testimony is to be believed, the prosecutor exceeded the scope of what would clearly be a proper inquiry by asking Bowden why he did not follow the procedure described by Hutchings regarding the key to the evidence locker, it is difficult to conceive how it could be thought that such a question, if improper, would prevent a fair trial and a just verdict so that a mistrial would have to be declared. The record does not support a conclusion that the prosecutor was trying to provoke a mistrial because his case had been going badly. *Compare People v. Pendleton* (1979), 75 Ill.App.3d 580, 31 Ill.Dec. 294, 394 N.E.2d 496.

In view of the foregoing, we do not reach the issue of "manifest necessity." The order of the circuit court of Lake County is therefore affirmed, and the cause is remanded for a new trial.

AFFIRMED and REMANDED.

HOPF and REINHARD, JJ., concur.